1950.

File No. O. Transfer of Property/50

Legal Department—
A **BRANCH**

K

Subject:— Opinions under the Transfer of Property Act, 1882

E.I. A-25

File No. O. Transfer of Property/50

Gen. 194 a.

298-A

C O N T E N T S

Legal Department File No.O.Transfer of Property/1950-

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Submitted. Please see R.H.D. note at page 27-28 ante.

One Kesarlal Kharichand Sarff, a refugee from W.Pakistan was granted a loan of Rs.300/- for opening a goldsmith's shop, in pursuance of a scheme, introduced by Govt. of Bom. for grant of loans to displaced persons, after taking an undertaking and mortgage in proper form. It appears an amount of about Rs.790/- was utilized by the refugee in purchasing tools etc. and the rest of the amount was misutilised. He failed in his efforts to establish a business and the department has taken into its possession the aforesaid assets. The refugee-mortgagor has left Bombay and has been in service with a saraf at Dehra Dun on Rs.70 P.M. On a previous reference made to R.L.A. in this connection he advised that Govt. will have to resort to cl. 6 of the mortgage and sell the property after a formal notice is given to the defaulter under sect. 69(2) of the T.P.Act. Accordingly a draft notice to be served on the defaulter, is prepared and R.L.A. is requested to advise whether it is in order.

EKN.21/6/ R,L.A. 3d/

Sir,

By a mortgage dated the ------- day of -----1950 you agreed to repay to Government the amount of Rs---- lent and advanced to your by Government for the purpose of----------together with interest therein at -----percent per annum from the ---- day of ------- on the dates and in the manner therein provided and also mortgaged to Government your assets/assets to be purchased by you with the said loan to secure the due repayment of the said loan and interest.

The said mortgage also provided that you shall utilise the amount of the said loan for the purpose of----------and that the said loan and all other moneys for the time being due thereunder shall immediately become payable and the security hereby constituted shall forthwith became enforceable in the event of --

(a) your committing breach of any one of the covenants of provisions contained in the said mortgage or

(b) if you should cease to carry on the business for any reason whatsoever.

Government understands that you failed to utilise the entire amount of the said loan for the purpose for which it was granted but instead utilised a substantial part thereof towards the maintainance of yourself andyour family in express breach of the provisions of the said Mortgage and also closed down your business since--1949, with the result that Government has become entitled to demand the immediate repayment of the entire amount of the said loan together with interest thereon and also to enforce the security constituted by the said Mortgage.

After you closed down your said business Govt.

has been able to take possession of the Mortgaged assets set out in Statement No.1 enclosed herewith. There is now due and payable by your to Government a sum of Rs.....for said laon and interest as per particulars set out in Statement No.2 enclosed herewith.

Under the circumstances youx are hereby called upon forthwith to pay to me on behalf of Government at may office the said sum of Rs,.....together with interest thereon at--percent per annum from the --- day----------19----till payment. In default of [illegible] compliance with the said requisition for payment within 3 months from the receipt of this letter by you Government will, without prejudice to its other remedies, sell by public auction the said assets described in the statement No.1 at your risk and on your account without any further reference to you.

Yours faithfully,

EKN.21/6/

Statement No.I.

Particulars of Mortgaged assets in Government's premises.

Statement No.2.

Principal amount Rs.

Interest thereon

at per cent

per annum form

day of 19

till day of

19. Rs-

Total. Rs.

Office of the R.L.A.

A revised draft notice is sent herewith.

Sd/ P. M. Lad.

Remembrancer of Legal Affairs.

U.R. to R.H.D.No.2361, dated the
17th February 1950-

EKM.21/6/

Office of the E.L.A.

Transfer of Property Act,1882.

Bombay Tenancy and Agricultural Lands Act,1948 sec.88(1)(a)

Bombay Rents Hotel and Loding House Rates (Control)Act, 1947.

Section 4(1).

The acceptance of a bid at an auction sale of an immoveable property amounts to a contract and the sale thereof is not complete unless and until the conveyance is passed and delivery of the possession has taken place. In the present case, it appears that so far there has been no conveyance of the property, nor has there been any delivery of possession. Consequently, the property has not yet passed to the vendees.

2. If the buyer has the notice of the tenancy he would only be entitled to symbolic possession and not actual possession (see Mulla's Transfer of Property Act, page 317). In the present case there is absolutely nothing to show that the Vendees had any notice of tenancy. In the terms of auction sale there has been no mention about the lands being in possession of tenants. Prima facie, therefore, in the absence of any contract to the contrary, Government would be liable to hand over vacant possession of the lands ~~xxx~~ to the vendees. For the purpose of effecting the sale there must be a real delivery of the property (see Biswanath Prasad v.Chandra Narayan. 48 Cal.509; also section 55 sub-section (1) (f) of the Transfer of Property Act). Government would, therefore, have to give vacant possession to the Vendees, otherwise, it would beopen to the vendees to rescind the contract.

3. It appears that there may be not bemuch difficulty for Government to hand over vacant possession the lands to the vendees. The provisions of the Bombay Tenancy and Agricultural ~~x~~Lands Act,

1948, have no application to the lands held on lease from the Crown (See sectionm88 (1) (a))nor do the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act,1948, apply to premises belonging the Government (see section 4 (1)). Consequently, if the persons in possession of these lands are tenants there would be no difficulty in terminating the lease and evicting them. If, however, they are mere trespassers, it would be still easier to evict them under the provisions of the Bombay Land Revenue Code as these lands still vest in Government.

Sd/ P.M.Lad.
Remembrancer of Legal Affairs.

U.R. to P.&S.D.No.1000, dated the
21st January 1950.

EKN.21/6/

R.I.No.5119 dt.24-3-60-

Submitted.

It appears that Poona City Municipality transferred its site at Swar Gate to the State Transport for a certain price. It was agreed while transferring the said land that so far as portions of land or premises which were leased by the Municipality and possession of which could not be immediately handed over, the State Transport should take steps to have them either requisitioned or acquired through the Collr. of Poona. It is now reported that the period of leases granted by the Municipality has expired and the State Transport wants the tenants to be evicted. The Collr. of Poona who was asked to take steps to evict them under theprovisions of the Bombay Land Revenue Code states that the land vested in the municipality and it is for the municipality to take action for eviction. The Municipality, when approached, pointed out that the whole land now vests in Govt. and as such it is not competent to take any action in the matter. Commr. C.D. agrees with the Collr. and states that the municipality should take action under sec.152 of the Boroughs Act or institute eviction suits. R.D. concurs with this view but H. & L.G D. does not agree with them. The R.L.A- is therefore requested to advise in the matter.

EKN.21/6/

Office of the R.L.A.

Eviction of occupants on land transferred by the Municipality State Transport Corporation.

The view taken by the Collector is correct.

2. It is presumed that no regular deed of transfer is passed by the Poona Municipality in favour of the state Transport Corporation. If so, the latter would not be entitled to evict and much less could Government do so. Consequently the Municipality will have to take steps to evict the tenants.

Sd/ P. M. Lad.

Remembrancer of Legal Affairs.

U.R. to H.D.No.4768, dated the 8th April 1950.

EKN.21/6/

Office of the R.L.A.

Since the displaced persons living in the camps have not agreed to pay rent nor have they paid any rent, no relationship of landlord and tenant has arisen. Consequently they will have to be ~~taken~~ treated as licencees. The license in respect of each should be terminated by a reasonable notice, say of a month or so and thereafter it is possible to evict them summarily. An ~~Extract~~ from R.L.A's recent opinion regarding unthorised occupation of requisitioned premises which is relevant to the present case is appended.

However the matter may be put beyond doubt by making suitable legislatuve provision, R.H.D. may put up the necessary proposals.

Sd/ P.H.Lad.

Remembrancer of Legal Affairs.

EKN.21/6/ U.R. to R.H.D.No.4951, dated the 10th April 1950-

Office of the R.L.A.

Shevde's Camera works: Interpretation of mortgage deed.

The mortgage deed creates a specific first charge on the existing assets set out in the Schedule and a floating charge on the undertaking and other future property and assets of the Mortgagor. Where it is proposed to include the uncalled captial it is usual to add the words "including the uncalled captial". It does not appear that in the present case it was contemplated that the uncalled captial also should be charged.

2- Assuming that the uncalled captial is also included in the security by implication a floating charge will not prevent the Company from calling up and dealing with the captial as and when required unless the floating charge has in the meanwhile crystalised by reason of the loan amount becoming due.

3. There is no legal objection to Government entering into possession of the mortgaged property into possession of the mortgaged property ~~xxx~~ as proposed by the Company and to conduct the business through the Agents. How far this will be practically feasible is a matter for the Administrative Department ~~xx~~ to consider.

Sd/ P.M.Lad.

Remembrancer of Legal Affairs.

U.R. to D.D.No.9851, dated the 7th July 1950.

EKN.21/6/

Office of the R.L.A.

In order to enable R.L.A. to give his opinion in the matter the Health andLocal Government Department is requested to furnish this office with all the relevant papers underlying Assistant Secretary's (i.e. R.S. Kamath's) note dated 10-2-43 and to state whether in the Municipal Record, the building is entered in the name of the Association, and if so, since what year.

Sd/

For Remembrancer of Legal Affairs.

U.R. to H. & L.G.D.No.8082, dated 18th July 1949.

EKN.21/6/

Office of the R.L.A.

St.Georges Hospital Nursing Association.

Transfer of Private Nursing Quarters to Government.

The object-clause in the memorandum can be relied on by the Association for the pmmpose of showing that the Associatimnx had the power or authority to take over the private nursingquarters and the property and liabilities of the St.George's Hospital Nursing Fund. It cannot however constitute the title of the Assocation which they will have to prove by some independant document such as a conveyance or at least a receipt for payment, particuarly when even the entries in the Municipal record are against the Associations's claim.

Sd/ P.M.Lad.

Remembrancer of Legal Affairs.

U.O. to L.S.G. & P.H.D. No.9252, dated the 4th July 1950-

EXM.21/6/

Office of the R.L.A.

Transfer of property Act, Section 108(m). Lease of court premises at Andheri.

Under clause 2, sub-clause (3) of the lease on the expiration of the term of the lease, the lessee is bound to restore thelease premises to the lessor in as good condition as they were in when they were in let except in so far as any damage or loss that may have been caused to them by reason of wear and tear of by Fire storm, earthquake or other act of God or as a result of civil Commotion. "Fire" as provided in this sub-clause means accidental fire and not fire caused by negligence of the lessee. Under section 108 clause (m) of the Transfer of property Act, a lessee is not responsible for accidental fire unless he has definitely taken that burden on his shoulder by a covenant, but the lessee is of course liable to fire lighted intentionally or caused by negligence. (See East India Distilleries and Factories vs.Mathias 51 Madras. 994. In Mulchand Nemichand vs. Vasudeo Ram Sarup, 48 Allahabad 404 it was held that the storage of cotton in an unventilated room where it was ignited by spontaneous combustion was negligence which made the lessee liable. In East India Distilleries and Factories vs.Mathias it was held that proof alcohol is not apparently liable to spontaneous combustion in any circumstance and consequently a person who keeps it cannot be considered to do so at his peril. In the present case the Police have been unable to trace the cause of fire and the Presidency Magistrate, Andheri has reported that the fire was an accidental one and was extinguished within fifteen minutes after detection. If therefore as reported the fire was purely accidental, Government as lessee would not be liable for damage.

Liability of Government for damage by fire.

The lessors are contending that the fire was caused by certain cinematograph films stored by the Court in the store room. The storing of cinematograph films is admitted on behalf of Government. The only question relevant would therefore be whether such films are liable to spontaneous combustion, which is a matter for the experts to decide (see rules 18 and 19 of the Cinematograph films Rules, 1948). If the used filmsstored in them present case were liable to such combustion, it wouldbe difficult for Government to escape the liabblity for damage to the building caused by the fire.

Sd/ P.M. Lad.

Remembrancer of Legal Affairs.

U.R. to H.D.No.14335. dated the 10th December 1949.

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Office of the R.L.A.

If the tenants are not vacating even after notice, steps may be taken to evict them through court.

Sd/- P. M. Lad.

Remembrancer of Legal Affairs.

U.R. to P.W.D.No.14249, dated the 10th October'50.

EKN.21/6/

R.I.N.18698/12-10-50.

Submitted withref. to P.& S.D. note at p.20.

It appears that flat No.4 1st Floor, "Dorchester" Queens Road, Bombay was in occupation of the office of the Iranian Trade Commissioner which closed long ago and the consul general for Iraon Occupied the said flat with the permission of the Govt. of Bombay in P.& S.D. and he has been in the occupation of the said flat for several years Mr.S.D.Mehta the owner of the above property mortgaged the same in favour of Hansraj Lakhmidas the mortgagee. The said first legal mortgage is said to be in the usual English form and contains unsual powers under the Transfer of Property Act for sale of the property, for entering into possession of the property, for appointment, of a Receiver of the income of the mortgaged property for entering into possession of the property, for appointment, of a Receiver of the income of the mortgaged property and otherpowers. The Consul General who has occupied the flat with the consent of Govt. (in P.& S.D.) refused to pay the rent to the mortgagee unless this Government directs him to do so. It is observed in the P.& S.D. note that it is not understood why the Consul General now requires direction form the Bom.Govt. and this does not come in the picture so far as payment of rent is concerned. The P. & S.D. purposed to write to C.G. that this Govt. has no objections his paying the rent to the mortgagee on hisbeing satisfied of his right and title to receive the same. R.L.A. is requested to see these papers for advi

EKN21/6/ vice.

In this respect he was paying the rent direct to the owner, now the ~~mortg~~ mortgagee, The tenancy existed and continues to exist in the name of the Consulate General for Iran. The flat is neither requisitioned nor rent is collected by the Bom. Govt.

Legal Department.

Transfer of Prope-sty Act, 1882, sec. 69A(4) &(5).

Seen and rerturned.

The view taken by P.& S.D. is correct. Consul General's attention may also drawn to sub-sections (4) and (5) of section 69 A of the Transfer of Property Act whereunder the receiver appointed by the mortgagee has power to demand and collect the rent of the promises and payment to him would be a full discharge of the liability.

Sd/ J.R.D.

Additional Secretary to Government.

U.R. to P.& S.D.No.14854, dated the 26th October'50.

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Office of the R.L.A.

It appears from the report of the Administrator, Rajpipla at pp.207 -210 of the file that the Rajpipla State purchased the mortgagee's rights and also elvied the summary settlement fees to save the forfeiture of the mortgage property by reason of the mortgage being without permission. Thesettlement fees would be covered by clause (c) of section 76 of the T.P.Act and Government can add these fees to the mortgage amount and claim the full payment of both when the mortgage is soughtto be redeemed. It would not be possible for Government to claim the settlement fees as arrears of land revenue particularly when the mortgagers were not a party to the settlement. No action appears necessary at this stage. The institution of a suit for redemption may be awaited. If no suit is filed in time, and matter may be reported to Government for further action.

Sd/ P.M.Lad.

Remembrancer of Legal Affairs.

U.R. to R.D.No.13978, dated the 5th October, 1950.

EKM.21/6/

Office of the R.L.A.,

The only terms agreed to by the Company were those stated in the letter of the Collector of Ratnagiri No.R.E.V.S.R.II/300 dated 1-3-1947. But the lease appears to have been renewed by Government for a further period of 10 years on entirely different conditions stated in G.R.R.D.No.1659/45 dated 22-7-1947, not agreed to by the Company. The renewal of the lease would not, therefore, be binding on the company . However, if the Company is still in possession of the land shown in appendix A appended to the form of the lease then the Company will have to be considered as a tenant holding over and its liability to pay with effect from 27-10-46 would be governed by the terms and conditions of the old lease of 1936. (See Mullas transfer of Property Act, page 738) There is no provision in the lease for recovery of the arrears as arrears of land revenue. The view taken by the Collector is correct. It will therefore be necessary to institute a civil suit against the company for recovering the amount. Before filing the suit Government can distrain moveable property of the Company found on the premises as stated in condition I in part IX of the lease and sell the same for ~~xxxix~~ satisfying the Government claim; It is also possible for the Government to enter upon the land as laid down in condition (2) in PartIX of the lease.

Sd/ P. N. Lad.

Remembrancer of Legal Affairs.

U.R. to D.J.No.15612, dated the 6th November 1950

EKN.21/6/

Office of the R.L.A.

Transfer of property Act, sec.108. clause (1). The Bombay Rents, Hotel Lodging House Rates Contrl Act,1947- secs.13(1)(h), 16(1).

In this case although the Commissioner of Police has vacated the premises he has not surrendered the lease. Consequently, the tenancy does continue and Government will have to pay rent of the premises. Under section 108 clause (f) of the Transfer of Property Act, " in the absence of a contract or any local usage to the contrary if the lessor neglects to make, within a reasonable time after notice, any repairs, which he is bound to make to the property, the lessee may make the same himself and deduct the expenses for such repairs with interest from the rent or otherwise recover it form the lessor." The due notice to make repairs was given to the previous landlord and that notice would be binding on his vendee, the present landlord. It is nearly more than 2 years since the premises were vacated to enable the landlord to carry out the repairs and no repairs have so far been done. It would therefore be competent for Government to carry out the repairs and to deduct the costs thereof with interest from the rent. But this would not relieve Government of the liability to pay the rent during the period. If, however, Government surrenders the lease without the landlord asking for the same under section 13(1) (h) of the Bombay rents, Hotel and Lodging House Rates Conrol Act,1947 through the Court, it would not be possible for Government to claim re-entry after repairs, under section 16(1) If Government considers that it would not be possible for them to carry out the repairs, the proper course appears to be, either to surrender the lease so as to terminate their liability to pay the rent or to force the landlord to carry out the repairs under the provisions of the City of Bombay Municipal Act, in pursuance of which it appears that the landlord is already given a notice by the Municipal Commissioner.

Sd/ P.M. Lad.

Remembrancer of Legal Affairs.

U.R. to L.& H.D. No.18628, dated 8th November '50.

SKN.21/6/

Office of the R.L.A.

The building site of Nana-Wada property was granted to the D.E. Society under a Sanad dated 30th December 1917 The sanad was granted under section 133 of the Bombay Land Revenue Code, 1879. There is no mention in the Sanad regarding the maintainance either of the Nana Fadnis Hall or the Meghadambari. On the other hand the interest of the Society under the Sanad is both transferable and heritable. From the Director of Public Instructions letter it appears although no conditions have been laid down for the maintainance of these two halls, the Society of its own accord undertook to maintain them out of a desire that the front should not be destroyed.

Section 11 of the Transfer of Property Act, 1882, provides that a restriction on enjoyment is repugnant to absolute interest unless such restriction is intended for securing the beneficial enjoyment of another propery of the transferor. Accordingly if it is proposed to impose restrictions upon the purchaser through the Society such restrictions would be void and of no effect as it is quite apparent that they are not intended to secure the beneficial enjoyment of any of the societies other properties.

However, it appears that under a Trust-Deed executed by the Society to secure the performance of the conditi of the building grant, the Nana-Wada premises including the building fittings and fixtures are vested in Governm upon trust to permit the society to enter upon and use the same for the purposes of a School or College subject to the conditions therein specified and in the event of the br ach of any of these conditi the premises would become the absolute property of Government free from all claims of the Society. It is possible for the Society who is a beneficiary to rel

its.....

its interest in favour of Government and once Government becomes absolute owner it can grant the premises to the purchaser subject to such conditions as it thinks proper, as under the crown (Government) Grants, Act 1895 the provisions of the transfer of property Act, 1882, do not apply to any grant or other transfer of land or of any interest therein by or on behalf of Government and all provisions, restrictions, conditions andlimitations contained in any such grant will be valid and take effect according to their tenor, any rule of law, statute or enactment notwiehhstanding. Consideration received from the purchaser may be paid to the Society as a fresh building grant for the purposes of its new buildings subject to the execution of the usual trust-deed.

The conditions to be imposed may be:-

1) The purchaser shall maintain the two halls and the buildings of which they form part in good order and repair to the satisfaction of the Executive Engineer, Poona Division. In default Government may carry out the repairs and recover costs from purchaser as arrears of land revenue.

2) No alterations or additions will at any time be made ho the facade or front elevation of the buildings facing the Shivaji Road or the architectural features of the two halls without the previous approval in writing of the Architect to Government.

3) Purchaser to permit Government Officer to inspect the premises after a week's notice.

4) If the Purchaser commits breach of any of the conditions Government mayresume possession of the entire premises without payment of any compensation.

It may be advantageous to finalise the conditions in consultation with public works Department.

U.R. to H.D.No.16428
dt.23rd Nov.1950-

Sd/P.M.Lad.
Remembrancer of Legal Affairs.

Office of the R.L.A.

Transfer of property Act, 1882. Section 58(e) 69 etc. Whether title deeds deposited by the Karnatak Co-operative Housing Society can be returned.

By G.R. Labour Department No.18/48 dated 9-4-1949, Government sanctioned a loan of Rs.4,35,577/- in favour of the Karnatak Co-operative Housing Society Ltd. As a security for repayment of the loan the Society has mortgaged to the Government the lands belonging to it and has also deposited with the Asstt. Registerar the title deeds of the property. The society proposed to draw an over-draft of Rs.50,000/- from the Shamrao Vithal Co-operative Bank Ltd. and as a security for this amount the Bank has asked for the deposit of the title deeds for creating an equitable mortgage. The Chairman of the Society states that the title deeds deposited with the Asstt. Registrar relate to a much larger area than that mortgaged to Government and proposes that the same may be handed over to the Bank for custody both on behalf of Govemment and the Bank. The Bank is willing to give a guarantee that it will not part with the documents except with the written consent of the Asstt. Registrar and except at the instance of the Civil Court. The R.L.A. is requested to advise whether there is any objection to granting to request made by the Society.

2. Under the mortgage-deed executed by the Karnatak Co-operative Housing Society Ltd. On 2966-1949, the society, in consideration of the loan of Rs.4,35,577/-granted by the Government, has undertaken to repay the amount in 35 annual instalments; and for this purpose by clause 5 has transferred absolutely their land at Matunga described in the Schedule along with the buildings under construction as well as those to be constructd in future. Clause 6 provides for the transfer of the mortgated premises to the Society upon payment of mortgage money. Under cause 7 the

provisions of section 69 of the Transfer of Property Act,1882, in regard to the mortgagor's power of sale are made applicable. It would be seen from the-se provisions that the mort gage in question is an English mortgage within themeaning of section 58(a) of the Transfer of Property Act, and the deposit of title deeds was not strictly necessary. The title-deeds seem to have been taken over as an additional security. But in view of the position stated above, there would be no objection to parting with them, esp ecially in view of the undertaking proposed by the Charmac Vitual Co-op-rative Bank Ltd.

Sd/ P.N. Lad.

Remembrancer of Legal Affairs

U.O. to L.& H.D.No18293, dated the 28th December 1950.

ZKN.22/6/